No. 87-1830

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term 1987

LARRY BLALOCK,

Petitioner,

v.

METALS TRADES, INC.,

Respondent,

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATUTES

42 U.S.C. §2000e 2

II. THE PETITION FOR A WRIT OF CERTIORARI IS TIMELY

Contrary to what the respondent stated in its Brief in Opposition to the Petition for writ of certiorari, this Court does have jurisdiction to consider the Petition for certiorari. The Petition is timely. The Petition for writ of certiorari was filed within ninety (90) days of the denial of the Petition for Rehearing from the decision of the Court of Appeals that affirmed the Trial Court's ruling in favor of the respondent. The Sixth Circuit Court of Appeals in its per curiam majority decision of November 30, 1987 did not re-enter a judgment of the Court that had been previously entered nor did it revise a previous judgment in an immaterial way. See, Federal Trade Commission v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206, 210-214, 73 S. Ct. 245, 248-249

(1952) and Brief in Opposition, at 9. That the Court of Appeals on November 30, 1987 applied a rule of law that it had enunciated two years earlier in Blalock v. Metals Trades, 775 F. 2d 703 (6th Cir. 1985) (Blalock I) did not mean that the Court was re-entering the previous judgment.

The Sixth Circuit Court of Appeals in Blalock I reversed the district court's finding that Metals Trades had not violated Title VII of the 1964 Civil Rights Act (42 U.S.C. §2000e). The Court of Appeals ruled that the plaintiff had proved by direct evidence that one of the reasons for the plaintiff's discharge was his religion and that the plaintiff would prevail unless defendant could prove by a preponderence of the evidence that defendant would have discharged the plaintiff for non-discriminatory reasons. Plaintiff had prevailed in Blalock I and

could not, contrary to the statement of the respondent (Brief in Opposition, at 10) petition for a writ of certiorari to this Court. If plaintiff had sought a writ of certiorari after the decision in Blalock I, he would have sought an advisory opinion on the rule of law enunciated by the Court of Appeals. The plaintiff could not have sought a review of the Court of Appeals' reversal of the opinion of the district court.

After the Court of Appeals issued its decision in Blalock I, the district court stated that it was relying on the rule that was enunciated in Blalock I and again decided in favor of the defendant (respondent herein).

As the Sixth Circuit Court of Appeals had previously enunciated the rule of law, the primary issue raised by the plaintiff (petitioner herein) in the

second appeal was that the finding of the district court was clearly erroneous. However, the plaintiff also stated in his appellate brief that:

> The ease of defendant's burden in the instant case is good support for the position that the Court should revise its standard in cases of mixed motivation to require defendants to prove by clear and convincing evidence that the plaintiff would have been discharged for legitimate reasons or that plaintiff's evidence that a discriminatory motive was one of the reasons for the discharge is sufficient by itself to establish a violation of Title VII.

Brief of Plaintiff-Appellant in Blalock II, at 37.

Similarly, the petitioner in the petition for re-hearing asked the Court of Appeals en banc to re-consider the standard in cases of mixed motivation. The petitioner argued that the Court of Appeals should require defendants in mixed motivation cases to prove that the plaintiff would have been discharged by

clear and convincing evidence or, in the alternative, hold that a plaintiff proves a violation of Title VII if he or she shows that one of the reasons for the decision is impermissible. Appellant's Petition for Rehearing, at pp. 14-15. Thus, contrary to what the respondent stated (Brief in Opposition, at 9), the petitioner did raise during the second appeal the issue of what the standard in mixed motivation cases should be.

The Court of Appeals in Blalock II affirmed the trial court's decision in favor of the respondent. The Court of Appeals held that the trial court did not err in ruling that defendant had proved by a preponderence of the evidence that plaintiff would have been discharged in the absence of discrimination. This was the first decision of the Court of Appeals that was ripe for review by this

Court, as it was the first appellate decision that the petitioner lost. The Petition for a Writ of Certiorari is challenging the appellate court's use of an incorrect rule of law in affirming the trial court's decision in favor of the respondent. The petitioner is not asking the Court to re-enter a decision that was handed down two years ago. That the rule of law applied by the Court of Appeals was first enunciated two years previously did not mean that the petitioner is prevented at this time from asking this Court to invalidate it and thereby reverse the judgment of the Court of Appeals.

III. CONCLUSION

The rule of law applied by the Sixth Circuit Court of Appeals in this case is so contrary to the unequivocable language of Title VII that it must be overturned by this Court. The Court of Appeals for

the Sixth Circuit has held that defendants can escape all liability under Title VII whenever a plaintiff proves discrimination if they can persuade a court that they would have treated plaintiff in the same way in the absence of discrimination. This rule of law will make most employment discrimination cases mixed motivation cases. Defendants will argue even in cases of overwhelming discrimination that are replete with direct evidence of discriminatory motivation that they would have done the same thing even if they did not discriminate. This rule of law requires trial courts to speculate what employers would have done if they had not discriminated. How can anyone ascertain what an employer would have done if its motivation were different - if it were not biased against persons of a

particular race, color, sex or religion? The case at bar demonstrates the problem in allowing trial courts to speculate about what would have happened in the absence of discrimination, as the trial court concluded that the respondent was not liable when there was no probative evidence of what it would have done if it did not discriminate against the petitioner on the basis of petitioner's religion.

The rule of law applied by the Sixth Circuit Court of Appeals dilutes the strong and unequivocable language of Title VII. The liability provisions of Title VII (42 U.S.C. §2000e-2) make all discrimination covered by the statute unlawful and does not excuse discriminatory action if accompanied with non-discriminatory motives. See, Bibbs v. Block, 778 F.2d 1318, 1321-1322 (8th Cir. 1985) (en banc). Partial

discrimination violates Title VII.

Furthermore, this Court should grant this petition along with Hopkins v. Price Waterhouse, 825 F.2d 458 (D.C. Cir. 1987), cert. granted, _____U.S._____, 56 U.S.L.W. 3601 (S. Ct. 1988). Both Hopkins and the case at bar involve the same issue - the rule of law in mixed motivation cases. The case at bar and Hopkins v. Price Waterhouse, supra, give this Court the opportunity to consider at one time two different standards that were enunciated by appellate courts in order to decide the rule of law.

If the Court were not to grant certiorari in the case at bar, the petitioner herein would be forever foreclosed from being able to take advantage of a rule that might be more favorable to plaintiffs than the one applied by the Sixth Circuit Court of

Appeals.

For the foregoing reasons and for the reasons set forth in the Petition for certiorari, the petition should be granted.

Respectfully submitted,

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APPENDIX F

(Excerpted from Brief for Plaintiff-Appellant, Case No. 86-4021 Sixth Circuit Court of Appeals, pp. 36, 37)

CONCLUSION

The Court below appears to have ignored this Court's mandate that the defendant prove by a preponderence of the evidence that the plaintiff would have been discharged on the date of the discharge for legitimate, non-discriminatory reasons and that the burden is a difficult one. The evidence that defendant had been somewhat dissatisfied with the plaintiff's work performance does not prove that this dissatisfaction would have been sufficient to cause Mr. Blalock's discharge. This is particularly so, when one considers that, as this Court held, that the "break in ... religious ties caused the entire web (of work, religion,

and personal relationship) ... to collapse". Blalock v. Metals Trades, supra, at 708. There was no evidence that the work relationship would have collapsed, if the religious relationship had not been severed.

The Court below made defendant's burden easy; it allowed defendant to articulate what might be considered a legitimate reason for the discharge (i.e., insubordination) without requiring proof to support the articulated expectations (such as contemporaneous statements and documents). One would think that a defendant who has been found to have made an employment decision on an unlawfully discriminatory basis, would be required at least to prove that it had told the plaintiff or others, before the plaintiff filed a discrimination charge, that it fired the plaintiff for certain, specified reasons; or perhaps be required

to have disinterested parties testify concerning the plaintiff's incompetence; or be required to show that the plaintiff had been warned that his or her work was so intolerable that he or she would be fired if the work did not improve. One would think that defendant would be required to present more evidence than a statement at trial that defendant was dissatisfied with the plaintiff's work performance or a statement to the Ohio Civil Rights Commission that the plaintiff was insubordinate.

The ease of defendant's burden in the instant case is good support for the position that the Court should revise its standard in cases of mixed motivation to require defendants to prove by clear and convincing evidence that the plaintiff would have been discharged for legitimate reasons or that plaintiff's evidence that

a discriminatory motive was one of the reasons for the discharge is sufficient by itself to establish a violation of Title VII.

Plaintiff therefore requests for the foregoing reasons, that this Court reverse and remand the case with instruction that judgment be entered for plaintiff.

APPENDIX G

(Excerpted from Appellant's Petition for Rehearing with a Suggestion for a Rehearing En Banc, Case No. 86-4021, Sixth Circuit Court of Appeals, pp. 14-15)

C. The Court Should Revise the Standard for Cases of Mixed Motivation

Plaintiff submits that because of the Trial Court's failure to require defendant to meet a difficult burden, this Court should en banc re-consider what the standard would be. We believe that this Court should, as some Courts of Appeals have required, hold that defendants must prove that the plaintiff would have been terminated for a legitimate reason by "clear and convincing evidence." See, Smallwood v. United Airlines, 728 F.2d 614, 620 (4th Cir. 1984) and Hopkins v. Price Waterhouse, 825 F.2d 458 , 471 (D.C. Cir. 1987). Cf. Haskins v. United States Department of Army, 808 F.2d 1192, 1199

(6th Cir. 1987), which like Blalock I, was written by Judge Contie. Such a standard would emphasize the difficulty of the defendant's burden which has been unheeded by the Trial Court.

This Court could, in the alternative, hold as the Eighth Circuit Court of Appeals held en banc, that the plaintiff proves a violation of Title VII if he or she shows that one of the reasons for the decision is impermissible. Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985) (enbanc). The Eighth Circuit Court of Appeals held in Bibbs that the Court may consider whether the plaintiff would have been terminated for legitimate reasons when considering relief. See also, Padhl v. City and County of San Francisco, 741 F.2d 1163, 1166 (9th Cir. 1984).